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ABSTRACT

This article discusses how many state courts, using the "judicially manageable" tools provided by state academic standards, are meeting the challenges set by "San Antonio Independent School District v. Rodriguez" in 1973. A generation ago this decision was regarded as a major setback to education reform because, faced with stark inequities in the funding of education for poor and minority children in Texas, the U.S. Supreme Court declined to order relief and declared education not a "fundamental interest" under the federal Constitution and that poor children did not constitute a "suspect class" entitled to special judicial scrutiny. One reason the Supreme Court did not rule in favor of the "Rodriguez" plaintiffs was that there were not "judicially manageable standards" for developing effective solutions to the problems. The search for judicially manageable standards has provided a potent legal initiative to ensure educational adequacy. The fact that legislatures and state education departments have developed clear criteria regarding the skills children will need to function productively as citizens in contemporary society has allowed courts to perceive more easily the core adequacy goals in the state constitution education clauses. In recent years a synergy has developed between education reform initiatives and judicial formulations of adequacy requirements that is resulting in the development of a concept of adequate education that may provide genuine opportunity for all students. (SLD)

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Studies in Judicial Remedies and Public Engagement

EDUCATION ADEQUACY LITIGATION AND THE QUEST FOR EQUAL EDUCATIONAL OPPORTUNITY

Michael A. Rebell

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Studies in Judicial Remedies and Public Engagement

Michael A. Rebell, Editor-in-Chief
Drew Dunphy, Executive Editor

This paper is one in a series of case studies of education finance litigations in various states. Through these studies, we hope to understand how court-ordered remedies were implemented and to determine what role, if any, public engagement processes played in these events. Specifically, we aim to test the hypothesis that reform initiatives are most likely to succeed in states where citizens have been involved in the remedial policy-making process. For that reason, the studies will encompass a wide range of reform experiences, including those where there was much public engagement and those where there was none.

The term "public engagement" is currently used to describe a wide range of activities. CFE's working definition of public engagement is a collaborative process in which a diverse range of individuals work together to arrive at solutions to complex social problems that a large majority of them can accept. Our hope is that this series of papers will help shape and refine our understanding of public engagement and its uses as a tool for change.

This series is made possible through the generous support of the Robin Hood Foundation and the Open Society Institute.

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EDUCATION ADEQUACY LITIGATION AND THE QUEST FOR EQUAL EDUCATIONAL OPPORTUNITY

by Michael A. Rebell[1]

Last year marked the twenty-fifth anniversary of the United States Supreme Court's landmark decision in *San Antonio Independent School District v. Rodriguez*.[2] *Rodriguez* was a watershed legal event in 1973, not because of any bold action the Court took at the time, but rather because of the abrupt halt it marked in federal judicial support of major educational reform. Faced with a pattern of stark inequities in the funding of education for poor and minority children in Texas, the Court declined to order relief; on the contrary, it declared that education was not a "fundamental interest" under the federal Constitution and that poor children did not constitute a "suspect class" entitled to special judicial scrutiny.

Although a generation ago *Rodriguez* was viewed by education reformers as a major set-back, with the benefit of hindsight we can now see that the Supreme Court's decision set the stage for a dramatic education reform initiative, one which now gives promise of actually ensuring meaningful educational opportunities for poor and minority children. In *Rodriguez*, the Supreme Court, although sympathetic to plaintiffs' plight, was unwilling to rule in their favor not only for doctrinal reasons, but also because it believed there were no "judicially manageable standards"for developing effective solutions to these poignant problems.

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[2] 411 U.S. 1 (1973).

In recent years, this search for judicially manageable standards has produced a potent legal initiative to ensure educational adequacy. The venue for these educational reforms has shifted to the state courts. Drawing upon educational standards promulgated by state education departments and state legislatures, many of the state supreme courts have mandated an "adequate" education for all students, one which will provide them with the opportunity to become productive participants in the political system and effective competitors in the economic marketplace. From these state court decisions, a core constitutional concept of adequacy directly related to state educational standards has emerged. This core concept focuses on providing students with a set of skills above a minimal "reading, writing and arithmetic" level, skills that will allow the student to participate in a democratic society and compete in the contemporary marketplace. Although strong emphasis is places on test scores and other output measures to assess progress toward meeting the standards, ultimately the core adequacy concept is rooted in fundamental values of educational opportunity.

This article will discuss how many state courts, using the "judicially manageable" tools provided by state academic standards, are meeting the challenge set by *Rodriguez* a generation ago. The mechanisms by which states are meeting this challenge give promise of providing meaningful educational opportunities to all children.

I. THE INITIAL EQUITY DECISIONS

Although the Supreme Court held in *Rodriguez* that education was not a fundamental interest under the U. S. Constitution, it decried the inequities in the Texas education finance system, stating that "the need is apparent for reform"[3] and challenging state authorities to come up with solutions. Since

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[3] *Id.* at 58-59. The Court also noted that the State of Texas had asserted in its brief that despite gross disparities in the funds available to educate students in various districts, "every child, in every school district [is assured] an adequate education." The Supreme Court left open the possibility that its ruling might be different in a future case if it were shown that all children

most state courts have lacked a tradition of extensive constitutional adjudication, they were "long shots for plaintiffs challenging discrimination in school finance systems."[4] Nevertheless, seeing a fertile legal argument in the U.S. Supreme Court's distinction between the role of education in federal and state constitutions, legal reformers in the mid 1970's initiated challenges to state education finance systems in a number of state courts. Several of the rulings in these initial cases found for plaintiffs, inspiring a plethora of follow-up litigations, and in the years since *Rodriguez*, constitutional challenges to state education finance systems have been launched in 44 of the 50 states. Thus, over the past twenty-five years, the development of constitutional doctrine concerning fiscal equity in education -- and the quest for judicially manageable standards -- have become matters of state rather than federal constitutional law.

Most of the state courts which initially found for plaintiffs in the years following *Rodriguez* accepted the basic equal protection arguments that had been rejected by the U.S. Supreme Court. Thus the California Supreme Court unequivocally held that even if education was not a fundamental right under the federal constitution, it clearly was so under the California equal protection clause.[5] The Connecticut and the Wyoming Supreme Courts,[6] also found that education was a fundamental interest under their state equal protection clauses. The Arkansas Supreme Court adopted the same "rational relationship" equal protection standard as the U.S. Supreme Court, but, in contrast to the federal High Court, it determined that the State's reliance on local property taxes had "no rational bearing on the educational needs of the

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were not receiving the "opportunity to acquire the basic minimal skills necessary for . . . full participation in the political process." *Id.* at 45.

[4] David C. Long, *Rodriguez: The State Court's Response*, 64 PHI DELTA KAPPAN 481, 482 (1983).

[5] Serrano v. Priest, 557 P.2d 929, 949-952 (Cal. 1977).

[6] Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

districts."[7]

The orders issued by these courts tended to direct the state legislatures to eliminate the inequities of the old system, but provided little specific guidance on precisely how they should do so. Some state legislatures adopted district power equalizing plans ("DPE")[8] which guaranteed each local district a specific amount of revenue for a given local tax rate, sometimes by "recapturing" the extra revenues generated by property-rich districts and redistributing them to property-poor districts. District power equalizing soon proved problematic, however, because:

> . . . the variability of local tax rates proved troublesome from several different perspectives. For example, some districts raised spending very little, taking almost all the aid in the form of local tax relief. At the other extreme, some districts were hyper-stimulated because they received large subsidies from the state for each dollar of local educational taxes.[9]

Moreover, recapture procedures involved in DPE schemes raised stiff opposition from wealthy districts, causing substantial legislative resistance to remedies in fiscal equity cases.[10]

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[7] Dupree v. Alma Sch. Dist. No. 30, 351, 651 S.W.2d. 90, 93 (Ark. 1983).

[8] Under a DPE system, every school district which imposes a particular tax rate is guaranteed a particular amount of revenue per child. If a district's actual tax rules yield an amount greater than the established per student expenditure level, the difference is forfeited to the state; if the actual tax receipts are less, the state makes up the difference.

[9] William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 729 (1992).

[10] DPE has proven to be "the single greatest practical problem with judicial decrees of fiscal neutrality . . . wealthier districts have proven the most determined foes of fiscal neutrality in constitutional litigation. Much of the delay and uncertainty in reaching stable legislative solutions has revolved around rich districts." *Id.* at 731.

Difficulties with district power equalizing led some courts to focus on reducing disparities in educational expenditures. Thus, in the second round of the California litigation, the trial judge held that wealth-related disparities among school districts (apart from categorical special needs programs) must be reduced to "insignificant differences," which he defined as "amounts considerably less than $100 dollars per pupil."[11] Unfortunately, this equalization mandate, combined with a constitutional cap on increases in local property taxes known as Proposition 13 which had been adopted by California's voters at the time, resulted in a dramatic leveling down of educational expenditures: whereas California had ranked 5th in the nation in per pupil spending in 1964-65, by 1994-95 it had fallen to 42nd.[12]

In short, although the call for equality through a fiscal neutrality approach had a powerful initial appeal, in practice the quest for fiscal equality has proved elusive. Although judicial intervention has apparently narrowed the funding disparities somewhat among school districts,[13] the core issues raised in *Rodriguez* -- determining an adequate level of education and ensuring that all students have a fair opportunity to achieve it -- were not satisfactorily addressed by these simple notions of fiscal equity. As Peter Enrich concluded:

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[11] Serrano v. Priest, 557 P.2d at 945.

[12] Mark Scheur & Steve Durbin, *Protecting School Funding*, SACRAMENTO BEE, June 28, 1993, at B4. William A. Fischel argued in *Did Serrano Cause Proposition 13?* 42 NAT'L TAX J. 465 (1989) that Serrano removed any incentive for residents in affluent districts to oppose Proposition 13.

[13] *See e.g.*, William N. Evans, Sheila E. Murray & Robert M. Schwab, *The Impact of Court-Mandated Finance Reform*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen, eds., 1999); Alan G. Hickrod et al., *The Effect of Constitutional Litigation on Educational Finance: A Preliminary Analysis*, 18 J. EDUC. FIN. 180 (1992); Bradley W. Joondeph, *The Good, The Bad and The Ugly: An Empirical Analysis of Litigation Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763 (1995); *cf.* Michael Heise, *State Constitutional Litigation, Educational Finance and Legal Impact: An Empirical Analysis*, 63 CINN. L. REV. 1735,1752 (1995).

> Equalizing tax capacity does not by itself equalize education. The educationally relevant disparities not only reflect the tax base inequalities, but local political and administrative choices as well, not to mention the impact of pre-existing differences in the students and their milieus.[14]

The difficulties of actually achieving equal educational opportunity through the fiscal neutrality approach, as well as political resistance to judicial attempts to enforce court orders in the initial fiscal equity cases, seem to have dissuaded other state courts from venturing down this path. Despite an initial flurry of pro-plaintiff decisions in the mid-1970's, by the mid-1980's the pendulum had decisively swung the other way: plaintiffs won only two decisions in the early 80's, and, as of 1988, 15 years after *Rodriguez*, 15 of the State Supreme Courts had denied any relief to the plaintiffs (essentially for reasons similar to those articulated by the U.S. Supreme Court in *Rodriguez*) compared to the seven states in which plaintiffs had prevailed.[15]

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[14] Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 147 (1995) (footnotes omitted). Molly McUsic also points out that states which equalize educational spending through greater state assumption of funding responsibility tend to spend less than the national average per student. Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of Fiscal Equity Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 114 (Jay Heubert, ed., 1999) [hereafter, *Promises and Pitfalls*].

[15] The states in which defendants prevailed were: Arizona (1973), Illinois (1973), Michigan (1973), Montana (1974), Idaho (1975), Oregon (1976), Pennsylvania (1979), Ohio (1979), Georgia (1981), New York (1982), Colorado (1982), Maryland (1983), Oklahoma (1987), North Carolina (1987) and South Carolina (1988). Plaintiff victories occurred during that period in New Jersey (1973), California (1977), Connecticut (1977), Washington (1978), West Virginia (1979), Wyoming (1980) and Arkansas (1983).

II. THE CURRENT ADEQUACY DECISIONS

In light of the U.S. Supreme Court's rejection of plaintiffs' claims in *Rodriguez*, and the difficulties experienced by the state courts which issued remedial decrees in the early years, it is remarkable that advocates and state court judges continued to seek new ways to assure fair funding and meaningful educational opportunities for poor and minority students. Even more extraordinary is the fact that in the last decade, there has been a strong reversal in the outcomes of state court litigations: plaintiffs have, in fact, prevailed in approximately two-thirds (17 of 26) of the major decisions of the state highest courts since 1989.[16]

What is the explanation for this widespread willingness of state courts – which have historically been reluctant to innovate in areas of constitutional adjudication – to uphold challenges to state education finance systems? The root causes seem to be two-fold. The first is the resurgence of a powerful "democratic imperative" at the core of the American political tradition.[17] By the mid-80's, civil rights advocates were being battered not only by defeat in state court fiscal equity decisions, but also by judicial retrenchment in federal school desegregation cases. Although some might have expected these defeats to extinguish the ardor of civil rights advocacy, the growing

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[16] Specifically, plaintiffs have prevailed in major decisions of the highest state courts or final trial court actions in the following 17 states: Kentucky (1989), Montana (1989), Texas (1989), Alabama (1993), Idaho (1993), Massachusetts (1993), Tennessee (1993), Arizona (1994), Kansas (1991), Missouri (1994), New York (1995), Wyoming (1995), Vermont (1997), New Hampshire (1997) and South Carolina (1999). A number of these cases involved reconsiderations (generally based on new legal theories) of challenges to state education finance systems by courts which had previously held for defendants. During the same time period, defendants have prevailed in the following 9 states: Wisconsin (1989), Minnesota (1993), Nebraska (1993), Virginia (1994), Maine (1995), Rhode Island (1995), Florida (1996), Illinois (1996), Pennsylvania (1999). The 1994 decision of the North Dakota Supreme Court held that the state's education finance system was unconstitutional but not by the requisite "super majority" vote.

[17] This point is discussed at length in Michael A. Rebell, *Fiscal Equity Litigation and the Democratic Imperative*, 24 J. EDUC. FIN. 23 (1998).

realization that more than 40 years after *Brown v. Board of Education* large numbers of children were still being denied an adequate education, and that those with the most educational needs continued systematically to receive the fewest educational resources, had the opposite effect: it inspired plaintiff attorneys to devise new legal theories and rendered courts open to considering them.

Second, a widespread sentiment that the American education system was in serious trouble permeated the national psyche in the mid-80's. The courts' assumption in *Rodriguez* and other early cases that virtually all students were receiving an adequate education was turned on its head: it now appeared that a large number -- maybe even a majority -- of America's students were not receiving an education adequate to compete in the global economy.[18] The extensive educational reform initiatives most states adopted to meet this challenge provided the courts with workable criteria for defining a minimally adequate education and for developing the "judicially manageable standards" they had long sought in dealing with potential remedies in complex educational litigations.

The state courts have been particularly receptive to new claims based on allegations that large numbers of students are being denied an adequate education. In recent years, they have repeatedly issued statements such as: "[I]n this state a constitutionally adequate education is a fundamental right. We emphasize that the fundamental right at issue is the right to a State funded constitutionally adequate public education."[19]

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[18] The U.S. Supreme Court's apparent willingness to revisit the issue of fiscal equity reform in a future case if it were shown that students were not being accorded an "opportunity to acquire . . . basic minimal skills," 411 U.S. at 1303, and the further precedent provided by *Plyler v. Doe* 457 U.S. 202 (1982)(total denial of educational opportunity to children of undocumented aliens is unconstitutional) indicate that the federal courts may have responded further to this democratic imperative if the state courts had not.

[19] Claremont Sch. Dist v. Governor, 635 A.2d 1375 (N.H. 1993).

The marked trend for plaintiff victories in the education finance challenges of the last decade is due largely to the overwhelming success of these adequacy claims. Specifically, 15 of the 17[20] plaintiff victories in the past ten years have involved substantial or partial adequacy considerations. Moreover, most of the state courts which have denied relief to plaintiffs seeking to invalidate state educational finance systems have indicated that the result might have been otherwise if plaintiffs had raised educational adequacy rather than classical "equity" claims.[21]

Why has adequacy become the predominant approach for plaintiffs challenging state education finance systems over the past decade? Why has this shift in legal strategy led to such an astounding turnabout in the advocates' success rate? The power of the democratic imperative certainly has been a major factor. The vision of equal educational opportunity, having been broadly proclaimed as the law of the land, can not be easily cabined. But renewed interest in the "quality education" potential of fiscal equity litigations would not, by itself, have dramatically shifted the outcome of legal initiatives in this area. The Courts needed practical remedial tools that would allow them to actually provide significant educational opportunities to poor and disadvantaged minorities. An important factor in the judicial turnabout, therefore, was that the necessary concepts for creating such judicially manageable standards were made available by the education standards-based reform movement which was embraced by virtually every state during this time period.

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[20] Adequacy concerns were major factors in the highest state court or final trial court decisions in Kentucky (1989), Alabama (1993), Idaho (1993), Massachusetts (1993), Tennessee (1993), Arizona (1994), New York (1995), Wyoming (1995), North Carolina (1997), Ohio (1997), New Hampshire (1997),Vermont (1997), and South Carolina (1999). Adequacy considerations were also significant in the remedies ordered by the state Supreme Courts in Missouri (1993) and New Jersey (1990, 1995, 1998), and in the settlements entered into in Kansas in 1992 and Baltimore, Md. in 1996.

[21] *See* Skeen v. State, 505 N.W.2d 297, 303 (Minn. 1993); Kukor v. Wisconsin, 236 N.W.2d 568, 578 (Wis. 1989); Scott v. Virginia, 443 S.E.2d 138, 142 (Va. 1994); School Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854 (Me. 1995).

A. THE STANDARDS-BASED REFORM MOVEMENT

In the mid-80's, a slew of commission reports had warned of a "rising tide of mediocrity"[22] in American education that was undermining the nation's ability to compete in the global economy. Comparative international assessments revealed poor performance by American students, especially in science and math,[23] and U.S. Department of Education assessments indicated that few American students "show the capacity for complex reasoning and problem solving."[24]

The first response to these reports was the enactment in most states of extensive reform laws imposing more rigorous academic requirements. For example, between 1980 and 1986, 45 states increased their requirements for earning a standard high school diploma.[25] It soon became clear, however, that simply raising requirements, without clarifying systemic goals and providing resources and techniques for reaching those goals, would not be effective. Consequently, commencing with President Bush's 1989 national summit on education, the nation's governors, business leaders, and educators began to work with the federal government to articulate specific national

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[22] NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983); *see also* CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, TASK FORCE ON TEACHING AS A PROFESSION, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY (1986); THEODORE SIZER, HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL (1989).

[23] NATIONAL ASSESSMENT OF EDUCATIONAL PROGRAMS, AMERICA'S CHALLENGE: ACCELERATED ACADEMIC ACHIEVEMENT (1990); *see also* Robert L. Linn and Stephen B. Dunbar, *The Nation's Report Card: Good News and Bad About Trends in Achievement*, 72 PHI DELTA KAPPAN 127,131 (1990).

[24] INA V.S. MULLIS ET AL., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 1992 TRENDS IN ACADEMIC PROGRESS 4-5 (1994); *see also* U.S. DEPARTMENT OF EDUCATION, AMERICA 2000: AN EDUCATION STRATEGY (1991).

[25] Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?* 14 HARV. J.L. & PUB. POL'Y 447,450 (1991).

academic goals.[26] Continued focus on the need for comprehensive, effective reforms geared to specific goals led to enactment of the federal Goals 2000 Act, an increasing emphasis on thorough-going standards and assessments in other federal laws and regulations,[27] and the development of an extensive state-level standards-based reform approach. Because education remains primarily a state and local responsibility in the United States, and most of the federal laws and regulations are geared to promoting the development of standards at the state rather than the national level, the state standards-based reform movement has, in recent years, become the primary arena for these reform initiatives.

Standards-based reform is built around substantive content standards in English, mathematics, social studies and other major subject areas. These content standards are usually set at sufficiently high cognitive levels to meet the competitive standards of the global economy, and they are premised on the assumption that virtually all students can meet these high expectations if given sufficient opportunities and resources.[28] Once the content standards have been established, every other aspect of the education system -- including teacher training, teacher certification, curriculum frameworks, textbooks and other instructional materials, and student assessments -- is

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[26] For a discussion of the origin of the national standards movement, *see* MARC S. TUCKER & JUDY B. CODDING, STANDARDS FOR OUR SCHOOLS 40-43 (1998), and DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION (1995).

[27] Recent revisions to Title I of the Elementary and Secondary Education Act , 20 U.S.C. §. 6301 et seq., the Individuals With Disabilities Education Act, 20 U.S.C. § 1401 et seq., and the Carl D. Perkins Vocational and Applied Technology Education Act, 20 U.S.C. 2301 et. seq., and their implementing regulations, all require program recipients to actively promote standards-based reforms. For a detailed discussion of the standards-oriented provisions of these laws, see Paul Weckstein, *School Reform and Enforceable Rights to Quality Education*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 306 (Jay Heubert, ed., 1999).

[28] "All children can learn; and we can change our system of public elementary, middle, and secondary education to ensure that all children do learn at world-class levels." NEW YORK STATE BOARD OF REGENTS, ALL CHILDREN CAN LEARN: A PLAN FOR REFORM OF STATE AID TO SCHOOLS (1993). *See also* JOHN T. BRUER, SCHOOLS FOR THOUGHT: A SCIENCE OF LEARNING IN THE CLASSROOM (1993).

revamped to conform to these standards. The aim is to create a seamless web of teacher preparation, curriculum implementation and student testing, all coming together in a coherent system which will result in significant improvements in achievement for all students.[29]

Standards-based reform substantially enhanced the fledgling educational adequacy notions alluded to in *Rodriguez* and others of the early fiscal equity cases. "Adequate education" was no longer a vague notion which, almost in passing, could be assumed to describe any state education system. The concept now had substantive content, and its underlying message was that most state education systems – and certainly many school districts that served predominantly poor and minority students – could probably be assumed to be below, and not above, the level of substantive expectations.

A major reason why the courts in *Rodriguez* and the other early fiscal equity cases refused to provide relief to plaintiffs was their apprehension that there were no judicially manageable standards to guide their involvement in this area. Therefore, the striking contrast in judicial attitudes in the recent cases may well be related to the courts' realization that the new state standards establish clear educational goals and specific means for implementing them. These goals provide the courts with the key tools for developing judicially manageable standards for providing meaningful educational opportunities for all students.

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[29] For general descriptions of the standards-based reform approach, *see* SUSAN FUHRMAN, DESIGN OF COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM (1993); TUCKER & CODDING, *supra* note 26; ROBERT ROTHMAN, MEASURING UP: STANDARDS ASSESSMENT AND SCHOOL REFORM (1995). For detailed updates on progress toward implementing this comprehensive ideal, *see* EDUCATION WEEK, QUALITY COUNTS '99 January 11, 1999.

III. THE CONSTITUTIONAL CONCEPT OF ADEQUACY

A. THE STRATEGIC SHIFT TOWARD ADEQUACY

The dramatic shift in plaintiffs' favor in recent state funding reform litigations stems from the courts' sense that adequacy provides both a more compelling legal perspective and more practical remedial tools for the courts than the prior fiscal equity concepts. The adequacy framework has solid historical roots in the common law origins of most of the state constitution education clauses. These substantive education clauses generally were incorporated into the state constitutions as part of the "common school movement" of the mid-nineteenth century, which attempted to inculcate democratic values by bringing together under one roof students from all classes and all ethnic backgrounds.[30] Whether the language of a particular state constitution speaks of a "thorough and efficient" education, an "ample" education or a "sound basic education," the common theme of these clauses is to provide an opportunity for an "adequate" level of education to all students.[31]

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[30] *See generally* LAWRENCE CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876 (1980); C. KASTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860 (1983). Compulsory schooling, which became prevalent in most states by the beginning of the twentieth century, added an additional powerful rationale for state constitutional guarantees of an opportunity for an adequate education.

Several of the state constitutions' education clauses were enacted in the 18th century and contained phrases concerning the duty of the legislature to "cherish . . . public schools" (Mass. Const. Part II, C. 5 §2), which courts have interpreted to mandate "an adequate education." McDuffy v. Secretary of Edu., 615 N.E. 2d 516, 545 (Mass, 1993). *Accord.* Claremont Sch. Dist. v. Gov., 635 A. 2d 1375, 1381 (N.H. 1993). *See also* Brigham v. State, 692 A.2d 667, 675 (Vt. 1997).

[31] A number of state constitutions contain general language requiring the legislature to maintain and support a "system of free common schools," which the courts have also interpreted to require some level of substantively adequate education. *See, e.g.*, Tennessee Small School Syst. v. McWherter, 851 S.W.2d 139, 150-51 (Tenn. 1993)(education clause requires a system that "generally prepare[s] students intellectually for a mature life"); Fair School Finance Council v. State of Oklahoma, 746 P.2d 1135,1149-50 (Okla. 1987)(education clause requires "a basic, adequate education"); Campaign for Fiscal Equity v. State of New York 655 N.E. 2d (N.Y.

As a matter of legal doctrine, "adequacy" avoids for courts the slippery slope problem that concerned the Supreme Court in *Rodriguez*. Invalidating a state education finance system on the basis of a state constitution's education clause establishes no direct precedent for other areas of social policy reform, as might be the case with a claim grounded in equal protection. Moreover, adequacy does not threaten the concept of "local control" of education, the main rationale for court decisions which had held for defendants in the past, because it does not necessarily undermine the prerogative of local communities to set their own tax rates and "because locals would remain free to augment their programs above th[e] state-mandated minimum."[32] To the extent that the emphasis on statewide standards is inconsistent with local control, those centralizing tendencies were already created by the regulatory framework of the standards-based reform movement.

Adequacy also tends to invoke less political resistance at the remedial stage because rather than raising fears of "leveling down" educational opportunities currently available to affluent students, it gives promise of "leveling up" academic expectations for all students. Although standards-based reforms would most dramatically improve the performance of the lowest achieving students, the reforms are comprehensive and intended to provide benefits to almost all students. Instead of threatening to shift money

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1995)(education clause requires "a sound basic education"); Abbeville Co. Sch. Dist. v. State of South Carolina, ___ So.2d ___ (S. Car. 1999)(education clause requires "a minimally adequate education").

[32] Molly McUsic, *The Use of Education Clauses in Litigation*, 28 HARV. J. ON LEGIS. 306, 328 (1991). For more detailed discussions of the strategic advantages of the adequacy approach, *see* Enrich, *supra* note 14, at 166-170, and *Promises and Pitfalls*, *supra* note 14. For general discussions of the shift from "equity" to "adequacy" holdings in the recent cases, *see* Allen W. Hubsch, *The Emerging Right To Education Under State Constitutional Law*, 65 TEMPLE L. REV. 1325 (1992); William Thro, *Note, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform*, 75 VA. L. REV.1639 (1989); Alexandra Natapoff, *1993: The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 WEST EDUC. L. REP. 755 (1994); and Deborah A. Verstegen and Terry Whitney, *From Courthouses to Schoolhouses: Emerging Judicial Theories of Adequacy and Equity*, in EDUC. POL'Y, 330, 331 (1991).

from rich districts to poor districts, therefore, adequacy offers the possibility of increasing the pie for all.

The appeal of the adequacy approach is reflected in the emerging consensus among courts, legislators, and educational policy makers that all students should be provided a reasonable opportunity to obtain an "adequate" education. For example, the National Conference of State Legislatures stated in a recent publication that "State policy makers and the courts should apply the test of 'adequacy' as a primary criterion in examining the effectiveness of any existing or proposed state school finance system."[33] Despite this wide-spread support for the general concept of "adequacy," however, there still is much discussion about precisely how such an adequate education should be defined and how sufficient funding can be provided to ensure all students a genuine opportunity for an adequate education.

In the early stages of the adequacy movement, the focus was on clarifying student entitlements in relation to gross denials of educational opportunities, and bringing to the fore the fallacy of the assumption in *Rodriguez* and many of the early state cases that all or most students were receiving an adequate education. As Peter Enrich has noted:

> In many states the conditions in the worst off school are so poor and the resources available to them so meager that the courts can reasonably be asked to find a dereliction of the state's educational obligations without the need to articulate or apply a determinate standard of adequacy.[34]

Now, however, as courts, state legislators and state education departments are increasingly facing the realities of actually implementing adequacy standards, the need to focus on substantive definitions of adequacy and

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[33] NATIONAL CONFERENCE OF STATE LEGISLATURES, EDUCATIONAL ADEQUACY: BUILDING AN ADEQUATE SCHOOL FINANCE SYSTEM 5 (1998).

[34] Enrich, *supra* note 14, at 173.

effective methods for funding and implementing them has come to the fore.[35] It has become increasingly clear that "the right to an adequate education . . . is meaningless without a workable and enforceable standard to measure adequacy."[36]

B. DEFINING ADEQUACY: AN EMERGING CORE CONSTITUTIONAL CONCEPT

While the precise definition of an adequate education, which is created by state statutes and state regulations, will vary from state to state, a core constitutional concept of adequacy, which establishes the parameters for legislative and executive actions in this area, has, in fact, been emerging in the constitutional case law over the past few years.

Although the major wave of state court adequacy decisions has occurred over the past decade, a few state courts began to articulate adequacy concepts right after the U.S. Supreme Court's ruling in *Rodriguez*. While most court rulings at the time were focused on equal protection precepts, the supreme courts of three states -- New Jersey, Washington and West Virginia -- relied on their state constitutions' adequacy clauses to strike down their state educational finance systems.

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[35] Initially, some courts and commentators tended to define adequacy in comparative terms based on the assumption that "an educational system that precluded the students of poorer districts from competing in the same market and society as their peers could not, by definition, be providing an adequate education." *Promises and Pitfalls*, *supra* note 14, at 116-117. *See also* Allan Odden and William H. Clune, *School Finance Systems: Aging Structures in Need of Renovation*, 20 EDUC. EVAL. & POL'Y ANALYSIS 157, 158.

[36] Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L. Q. 1193,1203 (1996).

The New Jersey Supreme Court based its 1973 ruling in *Robinson v. Cahill*[37] on the state constitution's "thorough and efficient" education clause. The Court defined the constitutional requirement as "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."[38] This definition reflects the origin historically of most state constitutional education clauses in the common school and compulsory education movements of the nineteenth century.[39] It is also consistent with *Rodriguez*'s analysis of education in terms of preparing a child to participate in the political process and "to exercise his First Amendment interest both as a source and a receiver of information,"[40] as well as the statement in *Brown v. Board of Education* that "[i]n these days it is doubtful that any child may be expected to succeed in life if he is denied an opportunity of

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[37] 303 A.2d 273 (N.J. 1973), *cert. denied, sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

[38] 303 A.2d at 295.

[39] *Cf.* Serrano v. Priest, 557 P.2d at 1959 ("Education is so important that the state made it compulsory"). In Yoder v. Wisconsin, 406 U.S. 205 (1972), the Supreme Court analyzed in detail the purposes of compulsory education before allowing the Amish plaintiffs a limited exemption from it. In doing so, the Court accepted the state's two-fold justification for compulsory education, i.e. preparation of citizens "to participate effectively and intelligently in our open political system," and preparation of individuals "to be self-reliant and self-sufficient participants in society." 406 U.S. at 221. For historical discussions of the purposes of compulsory education and its relation the common school movement of the 19th century, *see* LAWRENCE KOTIN & WILLIAM F. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE (1980); CREMIN, *supra* note 30, and KASTLE, *supra* note 30.

The logical relationship between compulsory education and a student's constitutional right to an adequate education was well stated by Betsy Levin: ". . . because the state has declared the fundamental importance of education, making it compulsory and public, it must ensure a basic level of education for all. Had the Supreme Court taken this approach in Rodriguez, it could not be accused of acting as a 'national school board.'" Betsy Levin, *Education as a Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much Is Enough*, 1979 WASH. U. L. Q. 703, 712 (1979).

[40] 411 U.S. at 112 (Marshall, J. dissenting). *See also, Id.* at 37 (reference in majority opinion to "the basic minimal skills necessary for the enjoyment of speech and of full participation in the political process").

education."[41]

The Washington Supreme Court also defined the state's constitutional duty to "make ample provision for the education of all children" in terms of the "educational opportunities needed in the contemporary setting to equip children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas."[42] West Virginia's analysis of the purpose of its state constitution's "thorough and efficient" clause was similar: it defined the core adequacy requirement in terms of preparation for "useful and happy occupations, recreation and citizenship."[43]

In sum, then, the three state supreme courts that first attempted to define adequacy in the early years articulated a similar concept of "adequate education" drawn from basic notions of a citizen's role in a democracy and the obligations of the state compulsory education system to prepare the child for competitive employment. The three courts, however, adopted different approaches for further developing this adequacy concept. In New Jersey the court remanded to the legislature the responsibility for fleshing out in detail the concept of a " thorough and efficient" education. The New Jersey legislature then described statewide education goals in general terms, and authorized the state education department to articulate specific statewide standards and to monitor the districts' success in meeting them.[44] The legislature's failure, however, to adequately fund and oversee this process led to a series of escalating confrontations with the court; along the way, the court essentially abandoned its attempt to define and implement an "adequate education" for all students and returned largely to an equity approach that sought parity spending levels with the 110 most affluent

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[41] 347 U.S. 483, 493.

[42] Seattle School Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978).

[43] Pauley v. Kelly, 225 S.E.2d 859, 877 (W.Va 1979).

[44] The legislative process standards, and problems that developed in their implementation, are discussed in Margaret E. Goertz & Malek Edwards, *In Search of Excellence for All: The Courts and New Jersey School Finance Reform*, 25 J. EDUC. FIN. 5 (Summer, 1999).

suburban districts -- albeit with a needs-based add-on -- for the 28 poorest urban districts in the state.[45]

The Washington Supreme Court also remanded to the legislature the responsibility for defining "a basic education" without providing specific guidelines on how to do so.[46] The Basic Education Act passed by the Washington Legislature in 1977 defined "basic education" in terms of broad educational goals and specified the minimum hours, days and instructional programs that school districts were required to offer. The state assumed the responsibility for fully funding the newly defined basic education through an allocation formula based on a ratio of students to certificated staff, with additional compensation for books, supplies, utilities and other specified costs.[47] Although initially quite promising, the Washington Basic Education Act, not being tied to any substantive adequacy goals, failed to take account of changing needs and developments. Within a decade it had become clear that the new system was not meeting the educational requirements of the state's neediest children.[48]

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[45] *See* Abbott v. Burke, 575 A.2d 359 (N.J. 1990). For a discussion of this trend toward increasing reliance on equity approaches in the remedial phase of the New Jersey litigation *see Leaving Equality Behind*, *supra* note 14, at 131-135.

[46] Seattle Sch. Dist., 585 P.2d at 95. The plaintiffs had asked the court to mandate explicit standards for defining the state's constitutional obligations in terms of student/teacher ratios, requirements for special education, and other elements of an educational program. The Court rejected this request, but it did instruct the legislature to utilize "dependable and regular tax sources" and stated that "the state's constitutional duty goes beyond mere reading, writing and arithmetic." *See* JAY G. CHAMBERS, THE ISSUE OF ADEQUACY IN THE FINANCING OF PUBLIC EDUCATION: HOW MUCH IS ENOUGH? 55 (1982).

[47] For details of the Washington legislation, see DIANE W. CIPOLLONE, DEFINING A BASIC EDUCATION: EQUITY AND ADEQUACY LITIGATION IN THE STATE OF WASHINGTON 10-11 (Campaign for Fiscal Equity Inc., Dec. 1998).

[48] Between 1976-77 and 1989-90, the share of state and local revenues received by districts educating the highest percentage of students eligible for free or reduced lunches fell 4.9%, while the share of districts with the lowest percentage of such students rose 2.5%. Neil D. Theobald and Faith Hannah, *Ample Provision for Home? The Evolution of State Control Over School Finance in Washington*, 17 J. EDUC. FIN. 7, 222-225 (1991). The trial court, in a decision that was not appealed to the Supreme Court, had at one point expanded the definition

The West Virginia Supreme Court issued a set of broad guidelines that defined the level of education required by the state constitution,[49] which the trial court then further developed into elaborately detailed standards in a 238-page decision.[50] This order was supplemented by a 356-page master plan for its implementation drafted by an advisory committee appointed by the state superintendent of schools and incorporated into a later court order. Both of these extremely detailed judicial mandates were, however, largely ignored by the legislature, and the state Supreme Court of Appeals took no active steps to enforce the order.[51]

The difficulties experienced by the New Jersey, Washington and West Virginia Supreme Courts in implementing their decrees undoubtedly discouraged other state courts from focusing on their constitution's education clauses. It was not until 1989 -- a decade after the last of these initial attempts -- that any state supreme court again considered concepts of adequate education. The first to do so was the Kentucky Supreme Court in *Rose v. Council for Better Education*.[52]

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of "basic education" to include special education, transitional bilingual, vocational and remedial programs, as well as pupil transportation, but did not guarantee a specific level of funding. For a discussion of the implementation of the Basic Education Act, *see* CIPPOLONE, *supra* note 47.

[49] Pauley v. Bailey, 255 S.E.2d at 877 (W.Va. 1979). These goals included literacy, ability to add, subtract, multiply and divide, knowledge of government, work-training interest in creative arts, and "social ethics."

[50] For example, the standards for Early Childhood Education required, among other things, a maximum student teacher ratio of 1 to 20, plus support personnel, including a nurse two days a week; facilities containing at least 50 square feet per child; and furniture which "permits easy reorganization of the room." Pauley v. Bailey, No. 7-1268 , 24-25 (Kanawha Co. Cir Ct, 1982).

[51] Pauley v. Kelly, 324 S.E.2d (W.Va. 1984). For discussions of the lack of effective implementation after this ruling, *see* Jack L. Flannagan, *West Virginia's Financial Dilemma: The Ideal School System in the Real World*, 15 J. EDUC. FIN. 229 (1989); Margaret D. Smith and Perry A. Zirkel, *Pauley v. Kelley: School Finances and Facilities in West Virginia*, 13 J. EDUC. FIN. 264 (1988).

[52] 790 S.W.2d 186 (Ky. 1989).

Although *Rose* had been brought on behalf of poor school districts seeking more equitable funding for their students, the Kentucky Supreme Court went further and invalidated the entire state system of education, because it was "inadequate and well below the national effort."[53] The Court then went on to hold that that an "efficient" education is one which has as its goal the development in each and every child of the following seven capacities:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
> (ii) sufficient knowledge of economic, social and political systems to enable the student to make informed choices;
> (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
> (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
> (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
> (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[54]

Thus, the Kentucky Court went beyond the New Jersey and Washington Courts in articulating the types of basic skills that students would need to develop in order to participate effectively as citizens in a democratic society and to be prepared to compete in the contemporary

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[53] *Id.* at 197.

[54] *Id.* at 186.

economy. In contrast to the West Virginia Court, however, it did not describe the skills or the manner in which they should be developed in explicit detail. In essence, the Court outlined the goals for a standards-based educational system and then left to the legislative and executive branches its further development and implementation.[55]

In formulating these specific educational goals, the Kentucky Court did not draw solely upon prior judicial precedents or legal sources. Extensive expert testimony and a post-trial brief filed by a blue ribbon citizens' education advocacy group, the Prichard Committee, had brought to the trial judge's attention the significant national education reform initiatives, including the emphasis on educational standards. In fact, after issuing his liability decision, the trial court judge stayed his decision on the appropriate remedy for six months. During that time, a select committee he had appointed held five hearings around the state – one of which was attended by the governor and all of which were covered extensively by the press – and then enumerated five student outcomes that it believed would constitute an adequate education.[56] The select committee's recommendations were substantially adopted by the trial court, and their key elements were also included in the final decision of the Supreme Court.

The Kentucky Court's formulation of the goals of an adequate educational system seem to have aptly reflected the essential aims of the developing state standards-based reform movement: their statement of educational goals has been directly adopted as the operative definition of adequacy by other state supreme courts,[57] and it has been the acknowledged

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[55] *Id.* at 212-213. The Court also held, *inter alia*, that the state education system must be monitored by the Legislature to assure that there is no waste or mismanagement, and that the "General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education."

[56] For a discussion of this process and the earlier public engagement activities on education reform that were led by the Prichard Committee, see Molly A. Hunter, *All Eyes Forward: Public Engagement and Fiscal Equity in Kentucky*, 28 J. L. & EDUC. 485 (October 1999).

[57] *See, e.g.*, McDuffy v. Secretary, 615 N.E.2d at 554.

inspiration for the development of analogous standards in a number of other states.[58]

A number of other courts have taken a different tack. Rather than fully defining the goals of an adequate education system themselves, they have placed greater emphasis on providing guidelines to the legislature on how an adequate educational system should be developed. Thus, the Ohio Court declared in broad terms that children must be "educated adequately so they are able to participate fully in society."[59] It then declared the current school foundation program unconstitutional and directed the state legislature to "create an entirely new school financing system" in accordance with certain basic guidelines laid down by the court. These included recognizing that public education must be seen as a single "statewide system," eliminating the emphasis on the local property tax, and ensuring that the system include "facilities in good repair and the supplies, materials and funds necessary to maintain these facilities in a safe manner . . . ."[60]

The Wyoming Supreme Court went even further in providing substantive instructions to the legislature on how to define the elements of an adequate education. It held that:

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[58] *See, e.g.*, Alabama Opinion of the Justice, 624 So.2d at 166. The New York Court of Appeals, in a preliminary decision on a motion to dismiss, issued a "template" definition of "the opportunity for a sound basic education" required by its state constitution. This definition included both substantive educational goals (basic skills "necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury") and specific resource essentials (including 'minimally adequate facilities," "minimally adequate instrumentalities of learning", "sufficient personnel adequately trained to teach . . .up-to-date basic curricula . . ."). Because the case was being remanded for a trial to determine the extent to which children in New York City are actually being provided these opportunities, the Court stated that after reviewing the full trial record it would finally resolve the question of how a sound basic education should be defined. Campaign For Fiscal Equity, Inc. v. State of New York, 655 N.E. 2d 661 (N.Y. 1995). The author is co-counsel for the plaintiffs in this case.

[59] DeRolph v. State of Ohio, 677 N.E.2d 733, 745 (Ohio, 1997).

[60] *Id.* at 747.

> To fulfill the constitutional command . . . the legislature must state and describe what a 'proper education' is for a Wyoming child. The constitution requires that it be the *best* that we can do. The legislature, in fulfilling its constitutional duty, must define and specify what that is. Trial testimony indicated aspects of a quality education will include:
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> 1. Small schools, small class size, low student/teacher rations, textbooks, low student/personal computer ratios.
> 2. Integrated, substantially uniform substantive curriculum . . .
> 3. Ample, appropriate provision for at-risk students, special problem students, talented students.
> 4. Setting of meaningful standards for course content and knowledge attainment intended to achieve the legislative goal of equipping all students for entry to the University of Wyoming and Wyoming Community College or which will achieve the other purposes of education.
> 5. Timely and meaningful assessment of all students' progress in core curriculum and core skills . . . .[61]

The Idaho Supreme Court took a different approach. Instead of giving the legislature explicit instructions on how to create appropriate adequacy goals and standards, it reviewed the existing standards, approved them and directly incorporated them into its constitutional definition, thereby making their effective implementation the hallmark of constitutional compliance. Thus the Court stated, in defining the requirements for a "thorough" education, that:

> Balancing our constitutional duty to define the meaning of the thoroughness requirement . . . with the political difficulties of the task has been made simpler for this Court because the executive branch of government has already promulgated educational standards pursuant to the legislature's directive . . . We have examined the standards and now hold that, under

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[61] Campbell County Sch. Dist. v. State of Wyoming, 907 P.2d 1238, 1279 (1995).

> art. 9, § 1 [of the Constitution] the requirements for school facilities, instructional programs and textbooks, and transportation systems as contained in those regulations presently in effect are consistent with our view of thoroughness.[62]

Despite the diversity in the approaches that the Courts have taken in these cases, are there any common constitutional purposes and standards upon which the various state supreme courts can be said to agree? Is there, in fact, an emerging core constitutional concept of an "adequate education"? An analysis of the recent cases indicates that this question can be answered affirmatively. The cases that have invalidated state educational finance systems for failing to provide students an opportunity for an adequate education seem largely to be in agreement on four key points.

First, there is broad agreement on the purpose of a constitutionally adequate education. Stemming from the nature of a democratic political system and the implications of compulsory education, an adequate system of education is one that "ensures that a child is equipped to participate in political affairs and compete with his or her peers in the labor market regardless of circumstances of birth or where that child is educated."[63] The overwhelming majority of state highest courts that have defined an adequate education have used some variation of this core definition.[64]

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[62] Idaho Schools for Equal Opportunity v. Evans, 850 P.2d 635 (Idaho, 1993). *See also* Fair School Finance Council v. State of Oklahoma, 746 P.2d at 1149.

[63] Vertegen and Whitney, *supra* note 32 at 348.

[64] See, Robinson v. Cahill, 303 A.2d, Pauley v. v. Kelly, 225 S.E.2d, Seattle Sch. Dist. No. 1 v. State, 585 P.2d, Serrano v. Priest 557 P.2d at 1258-59 (education is "crucial to . . . the functioning of democracy and to an individual's opportunity to compete successfully in the economic marketplace . . ."); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 395-96 (Tex. 1989)(citing intent of framers of education clause to diffuse knowledge "for the preservation of democracy . . . and for the growth of the economy."); Claremont Sch. Dist.v. Governor, 635 A.2d at 1381 (defining constitutional duty in terms of preparing "citizens for their role as participants and as potential competitors in today's marketplace of ideas"); Campbell Sch. Dist. v. Wyoming, 907 P.2d at 1259 (defining the core constitutional requirement in terms of providing students with "a uniform opportunity to become equipped for

Second, there is a recognition of the need to relate these core constitutional purposes to contemporary educational needs by reference to specific educational standards. These educational standards generally have been developed by commissions, state legislatures and state educational agencies. The availability of these educational criteria provide courts with the tools to formulate "judicially manageable standards" needed to judge the extent to which educational opportunities are being made available to meet the needs of all students, and to hold state and local decision makers accountable for meeting constitutional requirements.

Lower federal courts in the *Rodriguez* era had great difficulty when they attempted to define and deal with educational needs.[65] In contrast, courts in the recent cases have felt confident in asserting that students in districts with low achievement scores on statewide assessments are not currently receiving a constitutionally adequate education because these results "fall short of the very educational standards that the state . . . has determined are basic to providing its school children with minimally adequate educational opportunities."[66] Reliance on these standards not only provides a workable benchmark for assessing adequacy, but it also allows

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their future roles as citizens, participants in the political system, and competitors both economically and intellectually"); Brigham v. State, 692 A.2d at 673, 680 (right to education clause "guarantees political and civil rights" and preparation "to live in today's global market place"); Abbeville Co. Sch. Dist. v. State, S.E.2d (S.C. 1999)(defining minimum adequacy , *inter alia*, in terms of "fundamental knowledge of . . . history and governmental processes," and "vocational skills").

[65] See McInnis v. Shapiro 293 F.Supp. 327 (N.D. Ill. 1968), *aff'd* McInnis v. Oglivie 349 U.S. 322 (1969)(holding that plaintiffs' requested remedy – equal per capita funding – was inconsistent with their claimed constitutional right to a funding system based on "the educational needs of the student").

[66] Opinion of the Justices, 624 So.2d 107,128 (1993). The Alabama trial Court utilized three sets of state standards in determining that the state's schools were not providing an adequate education: the substantive educational standards set forth in the Alabama Education Improvement Act; state and regional accreditation standards; and indicators utilized by state officials such as drop out rates, college remediation rates, and workforce preparation. *Id.* at 127. *See also* Martha I. Morgan, Adam S. Cohen & Helen Hershkoff, *Establishing Program Inadequacy: The Alabama Example*, 28 U. MICH. J. L. REF. 559 (1995).

the courts to utilize "democratically enacted majoritarian standards" developed by the legislative and/or executive branches rather than remedial criteria crafted solely by inexpert judges in doing so.[67]

Third, although advances in test validation practices and the advent of the standards-based reform movement have emphasized "output" measures such as student achievement scores and dropout rates as important indicators of whether students are obtaining an appropriate education, the constitutional criterion for determining the level of educational services that must be provided for an adequate education remains educational "opportunity," not educational "results."[68] Output measures are important accountability devices for determining whether an education system is functioning well and whether further scrutiny is warranted, but they are not constituent elements of a constitutional definition of adequacy. [69] As Minorini and Sugarman have put it:

> . . . although educational adequacy is more about outputs than inputs, nevertheless, in the minds of many of its supporters, the achievement of adequacy does not appear to be ultimately judged by actual educational outcomes. It is still an opportunity concept, and as such, compliance with the adequacy requirement is ultimately still a matter of inputs, albeit now more broadly conceived. In other words, at the level of the

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[67] James Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 379 (1990).

[68] For a detailed discussion of the concepts of "equality of opportunity" and "equality of results" in American political history and in the evolution of federal desegregation doctrine, *see* MICHAEL A. REBELL AND ARTHUR R. BLOCK, EQUALITY AND EDUCATION: FEDERAL CIVIL RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM, chs. 1 and 2 (1985).

[69] See, e.g., Campaign for Fiscal Equity v. State, 655 N.E.2d at 666; Linda Darling-Hammond, *Standards of Practice for Learner-Centered Schools*, in ROBERT BERNE & LAWRENCE O. PICUS, OUTCOME EQUITY IN EDUCATION 191, 192-194 (1994).

> moral claim, educational adequacy seems to be about what fairly ought to be provided, leaving it in the end to the student to take advantage of that offering."[70]

Output results cannot fully determine constitutional requirements for two major reasons. First, we lack sufficient measurement tools to assess precisely the quality of education received by all students or the costs of reaching full substantive equality.[71] Second, not all of the factors that substantially contribute to low achievement can realistically be rectified through the schools.[72] "Adequacy," therefore, entails guaranteeing equality in the basic resources that schools can provide (decent facilities, safe environment, qualified teachers, up-to-date textbooks, etc.) and providing feasible additional support for students with special needs or at risk of educational failure that will give all students the opportunity to develop basic academic skills (such as English language facility or basic third grade reading skills) without, however, guaranteeing that all students will fully meet demanding state standards or that unlimited resources will be made available to overcome all impediments to equal educational outcomes.

Finally, consistent with the historic vision of equal educational opportunity and the high expectations of the standards-based reform movement which have fueled the adequacy engine, the courts generally have indicated that contemporary adequacy standards must be pegged well above a nineteenth century "reading ,writing and arithmetic" level.[73] The repeated

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[70] Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm in Equity and Adequacy*, *in* EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 188 (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen, eds., 1999).

[71] Henry M. Levin, *Little Things Mean A Lot*, 8 EDUC. POL'Y 396 (1994).

[72] *See* Gary Orfield, *Asking the Right Question*, 8 EDUC. POL'Y 404 (1994); W. Steven Barnett, *Obstacles and Opportunities: Some Simple Economics of School Finance Reform*, 8 EDUC. POL'Y 436, 444-445; Richard F. Elmore, *Thoughts on Program Equity: Programs and Incentives for Equity in Education*, 8 EDUC. POL'Y 453.

[73] Claremont, 635 A.2d at 1381; "[T]he notion what . . . level of achievement [defines adequacy] is historically defined. In 1920, the level may have been literacy; in 1950, it may

emphases in the liability findings in these cases is on the relative inability of poor districts to provide their students the type of quality education that is available to residents in the affluent districts and which is necessary for them to succeed as workers and citizens in contemporary society.[74]

The Montana Supreme Court was most explicit in articulating the implications of these comparisons. After contrasting the offerings in a number of poor and rich districts, it stated that "the wealthier school districts are not funding frills,"[75] and specifically held that the state's accreditation standard constituted only a "minimum upon which a quality education can be built."[76] Thus, in these cases, the courts have rejected the "minimalist standard of adequacy set in *Rodriguez*" and have called instead for "a quality education system"[77] which, in order to provide an adequate education under contemporary conditions, must be at "more than a minimum level."[78]

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have been an eighth grade reading level; in 1980 it probably would be thought of in terms of tenth to twelfth grade skills and some knowledge of algebra and geometry." Martin Carnoy, *Education Adequacy: Alternative Perspectives and Their Implications For Educational Finance*, 8 J. EDUC. FIN. 286, 288; "Almost two-thirds of today's workforce needs advanced reading, writing, mathematical and critical thinking skills, compared to only 15% of workers just twenty years ago." ACHIEVE, INC., BENCHMARKING TO THE BEST 3 (1999).

[74] Meeting at a national education summit in 1996, 41 of the nation's governors and 48 CEOs of the nation's major corporations issued a statement that "Today's economy demands that all high school graduates, whether they are continuing their education or are moving directly into the workforce, have higher levels of skills and knowledge . . . . In addition to basic skills, all individuals must be able to think their way through the workday, analyzing problems, proposing solutions, communicating, working collaboratively and managing resources such as time and materials." 1996 NATIONAL EDUCATION SUMMIT POLICY STATEMENT, 1.

[75] Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mon. 1989).

[76] *Id.* at 692.

[77] Verstegen and Whitney, *supra* note 32 at 347-348.

[78] Brigham v. State, 692 A. 2d at 680. *See* William H. Clune, *The Shift From Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994); Minorini & Sugarman, *supra* note 70, at 188 (". . . the high minimum approach focuses on what would be necessary to assure that all children have access to those educational opportunities that are necessary to gain a level of

In essence, the emerging four-fold constitutional definition of "adequacy" is a prudent judgment concerning the basic educational opportunities that a child will need to take his or her place as a functioning adult in contemporary society. The constitutional text and the constitutional precedents establish basic parameters for a concept of adequacy that is substantive yet continuously evolving. As the Wyoming Supreme Court put it, "The definition of a proper education is not static and necessarily will change."[79] As the level of educational skills necessary to participate as a citizen and as a wage-earner in the society rise, expectations for an adequate education will also necessarily rise. Although courts cannot guarantee that all students eventually will be successful citizens and economic competitors, they can guarantee that all students be given a reasonable opportunity to succeed in these domains, in accordance with contemporary functioning levels, and not in accordance with minimal standards of another century or another generation.

In conclusion, then, the fact that legislatures and state education departments have developed clear criteria regarding the skills children will need to function productively as citizens in contemporary society has allowed courts to perceive more easily the core adequacy goals in the state constitution education clauses. The courts, in turn, have used these basic constitutional concepts to guide legislatures and state education officials in further developing their educational standards and funding mechanisms. Thus, in recent years, there has been an active "synergy" between education reform initiatives and judicial formulations of adequacy requirements which might be said to constitute an implicit dialogue on adequacy among the courts, state legislatures and state education departments. The further development of the concept of an adequate education – and, equally important, its implementation in a way that will provide genuine educational

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learning and skills that are now required, say, to obtain a good job in our increasingly technologically complex society and to participate effectively in our ever more complicated political process"). *See also* Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education*, 24 J. EDUC. FIN. 51,67 (1998).

[79] Campbell, 907 P.2d at 1274. *See also* McDuffy v. Secretary, 615 N.E. 2d at 555; Robinson v. Cahill I, 303 A.2d at 295; Seattle Sch. Dist. v. State, 585 P.2d at 94.

opportunity for all students – will require continued and more extensive interchanges between courts, legislatures and education departments if government is truly to meet the educational needs of our children.[80]

[80] How the implicit dialogue among the three branches of government described here can be transformed into a more explicit on-going "colloquy" between the judicial, legislative and executive branches will be the subject of a forthcoming article by the author.